BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE
NO. 02-466, JUDGE JOHN RENKE, III SC03-1846

MEMORANDUM OF LAW REGARDING THE STANDARD FOR CONSIDERING CANON 7A(3)(a) and 7A(3)(d)(iii) FORMAL CHARGES

COMES NOW Respondent, JUDGE JOHN RENKE, III, by and through his undersigned counsel, and files this Memorandum of Law addressing the burden of the Judicial Qualifications Commission (the "JQC") to establish "actual malice" to prove a violation of Canons 7A(3)(a) or 7A(3)(d)(iii) and states as follows:

The constitutionality of judicial regulations governing campaign statements and representations has been recently scrutinized by the Eleventh Circuit Court of Appeals. The Eleventh Circuit found a Georgia judicial canon facially violative of the First Amendment to the United States Constitution because it prohibited not only "false statements knowingly or recklessly made" but also "false statements negligently made and true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact or create an unjustified expectation about results." See Weaver v. Bonner, 309 F. 3d 1312, 1320 (11th Cir. 2002)(reviewing Ga. Code of Judicial Conduct Canon 7(B)(1)(d)).

In contrast to the Georgia Canon, Florida Canon 7 specifically imposes the element of specific intent by requiring any misrepresentation to be "knowing." However, in this case, the JQC has interpreted Canon 7 in an exceedingly broad manner, resulting in an unconstitutional application. Review of First Amendment issues is not limited to the establishment of constitutional guidelines, but also encompasses consideration of whether principles have been constitutionally applied. See Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 508 (1984)(citing Speiser v. Randall, 357 U.S. 513, 525 (1958)). Weaver v. Bonner provides the appropriate standard to evaluate judicial campaign statements to ensure constitutional application of judicial regulations.

I. There is no meaningful distinction between judicial and legislative campaigns for the purpose of evaluating candidate statements.

The Weaver Court recognized the United States Supreme Court majority view that the "difference between judicial and legislative elections has been 'greatly exaggerated'" and did not find that any distinction between the two, "if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns." Weaver at 1321 (quoting Republican Party of Minnesota v. White, 536 U.S. 765, 784 (2002)). The Eleventh Circuit acknowledged the inevitability of erroneous statements occurring during the free exchange of ideas in a campaign and determined that the chilling effect caused by requiring judicial candidates to err on the side of silence was not narrowly tailored

to promote any compelling governmental interest. Weaver at 1319. In so holding, the Eleventh Circuit evaluated the impact of erroneous statements in campaigns. While accepting that false statements "may have serious adverse consequences for the public at large," the Eleventh Circuit noted "'erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need. . .to survive.'" Weaver at 1321 (quoting Brown v. Hartlage, 456 U.S. 45 at 60-61 (quoting New York Times, Co. v. Sullivan, 376 U.S. 254 (1964)(quoting NAACP v. Button, 371 U.S. 415 (1963))).

At the heart of any campaign, is the candidate's freedom to express his/her views without fear of reprisal for unintentional misrepresentations. See New York Times, Co. v. Sullivan at 270 (recognizing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."); See also Dockery v. Florida Democratic Party, 799 So. 2d 291, 293 (Fla. 2d DCA 2001)("Free discussion on sensitive and divisive political issues [is] the cornerstone of our democracy. The ability of the public to weigh all of the information on the issues and candidates, as well as the method that information is disseminated is guaranteed by the Constitution.")

The United States Supreme Court has noted that the fear of litigation can result in "self-censorship" in order to "'steer far wider of the unlawful zone'

thereby keeping protected discussion from public cognizance." Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)). So too does the threat of judicial discipline potentially suppress legitimate debate by judicial candidates, diminishing the public's information about the judges it is empowered to elect. To protect the public's role in judicial elections, the Weaver Court recognized the necessity for a very high standard to prove judicial campaign misrepresentations so as to permit sufficient freedom for a judicial candidate to vigorously communicate his/her qualifications.

II. The JQC must prove "actual malice" to establish a violation of Canon 7.

The Eleventh Circuit found that the Georgia Code did not permit sufficient "breathing space" because it prohibited "false statements negligently made and true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact or create an unjustified expectation about results." The Weaver Court held as follows:

> For fear of violating these broad prohibitions, candidates will too often remain silent even when they have a good faith belief that what they would otherwise say is truthful. This dramatic chilling effect cannot be justified by Georgia's interest in maintaining judicial impartiality and electoral integrity. Negligent misstatements must be protected in order to give protected speech the "breathing space" it requires. The ability of an opposing candidate to correct negligent misstatements with more speech more than offsets the danger of a misinformed electorate that might result from tolerating negligent misstatements.

Weaver at 1320 (*emphasis added*). To protect the "breathing space" in judicial campaigns, the Weaver Court adopted the actual malice standard originally set forth in Brown. Specifically, "to be narrowly tailored, restrictions on candidate speech during political campaigns must be limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the statement is false, i.e., an actual malice standard." Weaver at 1319. Moreover, Florida imposes even a higher standard since Canon 7 specifically mandates that any misrepresentation must be "knowing."

The Weaver Court clearly held that "false statements negligently made and true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact or create an unjustified expectation about results" do not meet the "actual malice" standard and thus do not constitute judicial misconduct. Weaver at 1319. Although Weaver does not otherwise define "reckless disregard as to whether the statement is false," several United States Supreme Court and Florida cases have addressed the standard. For example, in Garrison v. State of Louisiana, 379 U.S. 64, 74 (1964), the Court noted that the actual malice standard enunciated in New York Times, Co. v. Sullivan required the "false statements" to be made with a "high degree of awareness of their probable falsity." The Garrison Court emphasized that the "reckless-disregard-of-truth standard" is not the same as examining whether the declarant had a "reasonable

belief" as to whether the statement was false or whether the "exercise of ordinary care would have revealed that the statement was false." Id. at 79. Rather, the Court explained that "mere negligence" is insufficient to meet the reckless disregard of the truth standard. Id.

The Court has also found that the "mere proof of failure to investigate, without more, cannot establish . . . reckless disregard for the truth." Gertz v. Robert Welch, Inc., 418 U.S. 323, 332 (1974) (citing St. Amant v. Thompson, 390 U.S. 727, 731 (1968)). In St. Amant, the Court found that "reckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing," but whether the declarant "entertained serious doubts as to the truth of the publication." St. Amant at 730; See also Demby v. English, 667 So. 2d 350 (Fla. 1st DCA 1995)(emphasizing that the plaintiff's burden in proving actual malice is not to establish what a "reasonably prudent person" would do, but to show that the defendant "*in fact* entertained serious doubts as to the truth of his publication.").

Since the Eleventh Circuit determined that there is no discernable distinction between judicial and other elections, cases applying the actual malice standard in defamation actions brought by candidates in a public election are especially helpful. In Dockery v. Florida Democratic Party, 799 So. 2d 291, 293 (Fla. 2d DCA 2001), the Second District emphasized the dominance of First Amendment

protections over a candidate's individual sensitivities. The Second District initially noted, ". . . this Court is required to make rulings based upon principles of Constitutional Law, and not based upon its sense of political correctness, etiquette, or even fairness" and quoted Pullum v. Johnson, 647 So. 2d 254, 258 (Fla. 1st DCA 1994), by stating, "[t]he First Amendment requires neither politeness or fairness." Id. at 258. In applying the actual malice standard to the political statements contained in the candidate's circular, the Dockery Court determined that, "it is necessary to read the entire publication in context, not simply the offending words." Id. at 295. (citing Colodny v. Ivernson, Yoakum, Papiano & Hatch, 936 F. Supp. 917 (M.D. Fla. 1996)). The Second District also recognized that "reliance upon a reliable source insulates a defendant from a finding of actual malice as a matter of law." Id. at 296 (citing Holter v. WLCY T.V., Inc., 366 So. 2d 445, 452-53 (Fla. 2d DCA 1978); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)). Consequently, any review of an alleged false statement must include a thorough examination of the entire political mailer to consider the meaning of the statement in its full context as well as any reliable source supporting the assertions made in the mailer.

Given the recency of Weaver v. Bonner, the Florida Supreme Court has not examined the application of the actual malice standard in Judicial Qualifications Commission proceedings. However, the Florida Supreme Court has considered the

burden of proof in bar disciplinary proceedings alleging a violation of a Bar rule prohibiting conduct involving dishonesty, misrepresentation or deceit. R. Regulating Fla. Bar 4-8.4(c). While Rule 4-8.4(c) does not require the Bar to meet the actual malice standard to prove a violation, it does require specific intent.[1] Even with a lesser standard in bar disciplinary cases, the Court has required the consideration of other reasonable hypothesis of innocence when the intent to make a misrepresentation is inferred from circumstantial evidence. See Florida Bar v. Marable, 645 So. 2d 438 (Fla. 1994); Florida Bar v. Fredericks, 731 So. 2d 1249, 1251-52 (Fla. 1999).[2] Similarly, the Hearing Panel should determine whether any of the political statements referenced in the Amended Notice of Formal Charges are subject to interpretations other than the meanings suggested by the JQC in its charging document. If the statements are susceptible to more than one meaning, and one of the interpretations would not violate Canon 7, a reasonable hypothesis of innocence exists which precludes a finding of guilt.

The JQC cannot prove Formal Charges One through Seven because it cannot show record evidence that clearly and convincingly establishes actual malice. For example, in Charge One, the JQC attempts to prove a misrepresentation by arguing

[1] 1. See Florida Bar v. Langford, 691 So. 2d 480 (Fla. 1997) ("in order to find an attorney acted with dishonesty, misrepresentation, deceit or fraud, the Bar must show the necessary element of intent.").

[2] Marable pertains to consideration of underlying dishonest conduct that could be construed as criminal and Fredericks addresses potentially dishonest conduct that would not constitute a crime. In both cases, the Court indicates that a reasonable hypothesis of innocence should be considered.

that the statement, "A judge with our values" inappropriately suggests incumbency. The JQC ignores that in the full context of the political mailer, the statement was clearly meant to suggest that John Renke, III, would be "A judge with our values" if elected.

In Charges Two and Three, the JQC cites to accurate statements which it claims are misleading or deceptive. However, this theory of prosecution was specifically rejected in Weaver v. Bonner as not meeting the actual malice standard. In Charges Four, Five and Seven, the JQC refers to the judge's statements that were accurate and not misleading or deceptive. The JQC misquotes the judge's statement in Charge Four, transforming an accurate statement into a misleading one. In Charge Five, the judge is insulated from a finding of actual malice because he relied on a reliable source in characterizing Republican Party committeemen and committeewomen as "public officials." The judge's statements that he had broader civil litigation experience than his opponent as set forth in Charge Seven are supported by his opponent's deposition testimony in the present matter.

In Charge Six, the JQC references a misstatement made by the judge when he interchanged "trial experience" with the more appropriate term "litigation experience." The JQC overlooks the isolated nature of this misstatement showing that his comment was merely negligent. A thorough application of the actual

malice standard to the undisputed facts pertaining to Formal Charges One through Seven are set forth in Motions filed contemporaneously with this Memorandum of Law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of August, 2005, the original of the foregoing Memorandum of Law Regarding the Standard for Considering Canon 7A(3)(a) and 7A(3)(d)(iii) Formal Charges has been furnished by electronic transmission via e-file@flcourts.org and furnished by FedEx overnight delivery to: Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; and true and correct copies have been furnished by regular U.S. Mail to Judge James R. Wolf, Chairman, Hearing Panel, Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; Marvin E. Barkin, Esquire and Michael K. Green, Esquire, Special

Counsel, 2700 Bank of America Plaza, 101 East Kennedy Boulevard, P. O. Box 1102, Tampa, Florida 33601-1102; Ms. Brooke S. Kennerly, Executive Director, Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; John R. Beranek, Esquire, Counsel to the Hearing Panel, P.O. Box 391, Tallahassee, Florida 32302; and Thomas C. MacDonald, Jr., Esquire, General Counsel, Florida Judicial Qualifications Commission, 1904 Holly Lane, Tampa, Florida 33629.

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